No. 88-1543

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

KENTUCKY STATE POLICE DEPARTMENT, et al., - - - - - Petitioner

versus

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION - - - - - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

In 1984, the Equal Employment Opportunity Commission (EEOC) sued the Kentucky State Police (KSP), alleging that its mandatory retirement age of 55 violated § 4(a)(1) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1). After a three-day bench trial, the district court found that the KSP had met the two-prong Bona Fide Occupational Qualification (BFOQ) exception of § 4(a)(1) of 29 U.S.C. § 623 based on the medical testimony of Drs. Lind and Antlitz. On appeal, the Sixth Circuit reversed, relying on the "minimum health and fitness standards" test adopted by the Third and Fifth Circuit. The questions raised in this Petition are as follows:

1. Must a law enforcement employer develop and maintain "minimum health and fitness standards" to satisfy the first prong of the *Western Airlines, Inc.* v. *Criswell* BFOQ test as the Third, Fifth, and now, Sixth Circuit hold; or, is the recently created "minimum health and fitness standards" requirement a serious judicial misconstruction of *Criswell* that unnecessarily intrudes on State sovereignty, as the First and Eighth Circuit hold?

2. Did the Sixth Circuit directly violate the "clearly erroneous" Rule of *Anderson* v. *City of Bessemer City, North Carolina*, when it rejected out-of-hand the substantial medical testimony of two medical experts, Drs. Lind and Antlitz, that cardiovascular fitness and aerobic capacity are safety-related job qualifications reasonably necessary to the performance of a KSP officer's job, and that the KSP is compelled to rely on age as a proxy for these safety-related job qualifications?

PARTIES TO THE PROCEEDING

Pursuant to United States Supreme Court Rules 21(b) and 28.1, the Petitioner states that the primary parties to this appeal are, for the Petitioner, the Kentucky State Police Department, the Kentucky Secretary of Justice, the Commissioner of the Kentucky State Police Department, the Board of Trustees of Kentucky, Retirement Systems, and the Commonwealth of Kentucky. The primary party for the Respondent is the Equal Employment Opportunity Commission.

The remaining third-party defendants to this action are some thirty-six individual Kentucky State Police Officers. The names of these officers may be found in the attachment to the complaint of the EEOC, filed in the district court for the Eastern District of Kentucky, and in the third-party complaint of the Petitioners, also filed in the same court.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION - - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Kentucky State Police Department respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unpublished order of the Sixth Circuit Court of Appeals, denying the Petitioners' Petition for Rehearing En Banc, entered on January 13, 1989, is attached as Appendix A. The published opinion of the Sixth Circuit of Appeals, reversing the decision of the District Court for the Eastern District of Kentucky, entered on November 1, 1988, is attached as Appendix B. The unpublished opinion of the district court, entered on December 17, 1986, is attached as Appendix C.

JURISDICTION

The unpublished order of the Sixth Circuit Court of Appeals, denying the Petitioners' Petition for Rehearing En Banc was entered on January 13, 1989, on the timely Petition for Rehearing filed by the petitioners on November 10, 1988, nine days after the published opinion of the Sixth Circuit to the same effect was entered on November 1, 1988. This petition for certiorari is within sixty days of January 13, 1989, as required by Supreme Court Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 29, United States Code, § 623(a)(1)

> It shall be unlawful for an employer —
>
> (1) To fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . . .

Title 29, United States Code, § 623(f)(1)

> It shall not be unlawful for an employer, employment agency, or labor organization —
>
> (1) To take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, ...

Title 29, United States Code, § 623(i)

> It shall not be unlawful for an employer, which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken —
>
> (1) With respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and
>
> (2) Pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

STATEMENT OF THE CASE

This is a petition for review of a published opinion of the Sixth Circuit Court of Appeals, reversing a decision of the district court that found the age-related mandatory retirement provisions for the Kentucky State Police (KSP) to be a Bona Fide Occupational Qualification (BFOQ) reasonably necessary to the normal operation of the KSP. In 1984, the Equal Employment Opportunity Commission (EEOC) brought suit against the KSP pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* By its complaint, the EEOC challenged the lawfulness of Kentucky Revised Statute 16.505(15) that required all KSP sworn personnel to retire at age 55. The KSP defended the mandatory retirement provisions

of K.R.S. 16.505(15) on the grounds that age is a bona fide occupational qualification reasonably necessary to the normal operation of the KSP under § 4(f)(1) of 29 U.S.C. § 623.

In April of 1987, District Judge Bertelsman of the Eastern District of Kentucky, conducted a three-day bench trial on the parties' claims. The trial began with the proof for the defendants. This proof consisted of the testimony of nine KSP members, including Morgan T. Elkins, Commissioner of the KSP. The State Police further offered the testimony of two medical experts, Dr. Alexander Lind, a physiology professor at St. Louis University, and Dr. Michael Antlitz, a Board-certified cardiologist. The EEOC presented the testimony of several retired KSP officers and its own two medical experts, Dr. Michael L. Pollock, an exercise physiologist, and Dr. Arthur Leon, a non-Board-certified cardiologist.

Kentucky State Police officers testified for the defendants that each of the 968 sworn officers has a duty to detect and prevent crime, apprehend criminals, monitor law and order throughout the state and to enforce the motor vehicle and traffic laws of the Commonwealth. All officers are on duty 24 hours a day, and are expected to respond to emergency situations at any time. All officers, regardless of rank, are required to make arrests, maintain a pursuit vehicle, carry a firearm and investigate crime and accidents encountered both on and off duty. This includes offi-

cers assigned to desk duty. Troopers also are frequently assigned to patrol more than one county, using a one-man, one-car patrol.

The same officers testified extensively to specific examples of safety-related situations arising in their employment that required physical fitness, aerobic capacity and cardiovascular fitness. These situations included: high speed automobile chases; apprehension of armed and dangerous criminals; assistance of vehicle accident victims and control of vehicle accident scenes; service of arrest warrants, search warrants; and drug raids. Based upon his experience, and his observations of the aging process on Kentucky State Police officers, Commissioner Elkins testified that the age of 55 is "an absolute upper limit on the retirement for police officers." [Elkins, T.E., Vol. I, p. 36-37.]

The defendants' medical experts, Dr. Lind and Dr. Antlitz, both agreed with Commissioner Elkins' conclusion. Dr. Lind testified that all physiological function deteriorates with age, including aerobic and anaerobic capacity, strength and endurance. The doctor testified that an aerobic capacity of approximately three liters of oxygen is necessary for efficient performance of KSP work. Based on statistics, he concluded that only two or three individuals per 100 would possess sufficient aerobic capacity at age 55 to safely and efficiently perform the tasks required of the KSP. Although exercise might improve aerobic capacity minimally, this improvement would be more than offset by environmental influences of summer heat and winter

cold. Dr. Lind concluded that the mandatory requirement age of 55 is reasonably necessary for the safe and efficient function of the Kentucky State Police. (Dr. Lind, T.E., Vol. II, p. 221-222.]

The defendants' second medical expert, Dr. Antlitz, testified that a 50 percent narrowing of the coronary arteries would be significant with respect to the KSP personnel. The doctor further indicated that by approximately age 55, there existed within the population a 70 to 75 percent probability that a given individual would have a 50 percent obstruction of one or more of the coronary arteries. To quote the doctor, the incidence of coronary artery disease "sky-rockets up in that age group [the 50's], again giving further evidence of the age relationship of coronary artery disease." [Dr. Antlitz. T.E., Vol. II, pp. 285-286.]

Dr. Antlitz further testified that within a degree of reasonable medical probability, as many as half of the individuals incurring heart attacks were asymptomatic prior to their first cardiac event, and that heavy physical exercise increases the likelihood of heart attack. Finally, the doctor concluded that no non-intrusive tests exist that will state whether any specific individual does not have significant coronary artery disease on an individual basis. Similar to Dr. Lind, Dr. Antlitz concluded that the mandatory retirement age of 55 is reasonable with regard to the safe and efficient operation of the Kentucky State Police Department. [Dr. Antlitz, T.E., Vol. II, p. 307.]

On the issue of physical fitness programs, Dr. Antlitz testified that his opinion regarding the reasonableness of the 55-year mandatory retirement provision would not be affected by annual physical examinations, no-smoking programs or cholesterol reduction programs. Although these programs are beneficial, the doctor concluded that the inescapable fact remains that these programs will not reduce the amount of coronary artery obstructions.

As expected, the EEOC medical experts, Drs. Pollock and Leon, strongly disagreed with Dr. Lind and Dr. Antlitz. Dr. Pollock challenged Dr. Lind's reliance on the three-liter aerobic capacity standard and testified that while aerobic capacity does decline with age, there are other important factors, such as genetics and lifestyle, that influence aerobic capacity. Dr. Pollock further testified that sufficient tests do exist to determine aerobic capacity, and that he had helped institute such tests with the Texas police. However, on cross-examination, the Petitioners confronted Dr. Pollock with the final page of his own fitness and coronary heart disease article (which the EEOC omitted to include in its exhibit containing the article). The omitted portion of the article, introduced by the defendants, noted that police officers have a higher death rate from coronary heart disease than other professions, that police officers have an above-average risk factor for coronary disease, and that there is a distinct increase in coronary risk with age. [Dr. Pollock, T.E., Vol. III, pp. 524-530.]

Dr. Arthur Leon, the EEOC's non-certified cardiologist, testified that functional age is determined by hereditary, disease factors, health and lifestyle habits. The doctor further concluded that smoking, excess weight and exercise habits have a more significant impact on aerobic capacity than mere age. On the issue of testing for coronary disease, Leon testified that only five to eight percent of those 55-year-olds tested would be asymptomatic for coronary artery disease. Of 100 individuals, only six would be at risk to have a coronary event within ten years. According to Dr. Leon, age alone as a predictor of coronary disease would result in false positives 94 percent of the time. Eliminating smokers from the test group, Leon stated that he could tell with almost 100 percent accuracy who would be at risk for a coronary event within ten years. [Dr. Leon, T.E., Vol. III, pp. 587-651.]

Dr. Leon further maintained that the KSP, at present, had members under the age of 55 who were at great risk for coronary events. Like Dr. Pollock, however, Dr. Leon was impeached with his own scholarly work on physical activity levels and coronary heart disease, in which he wrote that existing epidemiologic studies strongly suggest, but *fall short of proving,* the concept that habitual physical exercise offers *partial* protection against primary or secondary events of coronary heart disease. [Dr. Leon, T.E., Vol. III, pp. 665-666.] [Emphasis added.]

Other witnesses for the EEOC also established that members of the KSP with known coronary conditions,

such as former members Haddix and Coffy, had been allowed to remain on duty in spite of their heart conditions. Although the KSP maintained a fitness testing program for members of its Special Response Team (SRT), this group was the only group of KSP employees tested regularly for fitness. Although members of the KSP are monitored by their supervisors to prevent health risks, personnel are not required to submit to annual physical exams, absent a specific, known health problem.

Based on this conflicting testimony, the district court concluded that age is a BFOQ for Kentucky State Police officers. Relying upon *Western Airlines, Inc.* v. *Criswell*, 472 U.S. 400 (1985), the trial court found that "cardiovascular fitness and aerobic capacity are traits reasonably necessary to the performance of a Kentucky State Police officer's job." [Appendix C.] Although the KSP was found not to be 'exemplary' in health monitoring of its employees, the district court joined the First Circuit in concluding that "a failure to continuously monitor physical standards does not, standing alone, compel a finding that physical fitness is not a reasonably necessary job qualification." *Equal Employment Opportunity Commission* v. *City of East Providence*, 798 F. 2d 524, 528 (1st Cir. 1986). The district court then continued to find that 1) all experts agree that there is a significant increase in coronary risk with age; 2) that substantially all people over 55 lack aerobic capacity necessary to perform as KSP officers; 3) that although aerobic capacity can be ac-

curately tested, cardiovascular disease cannot; and 4) cardiovascular disease is often asymptomatic and that by age 55, almost 80 percent of the population has at least a 50 percent obstruction of at least one coronary artery. Further, the Court found that non-intrusive testing for cardiovascular disease is not sufficiently advanced to be a reliable substitute for the mandatory retirement age. In addition to these findings, the district court noted the recent amendment of 29 U.S.C. § 623(i) to exempt firefighters and law enforcement officers from ADEA provisions until 1993, and the long-standing mandatory retirement age for federal law enforcement officers.

On appeal, the Sixth Circuit reversed the decision of the district court, and held that age is not a BFOQ for the Kentucky State Police. In its decision, the Sixth Circuit rejected the reasoning of *City of East Providence* and relied instead upon *EEOC* v. *Pennsylvania,* 829 F. 2d 392, 396 (3rd Cir. 1987). In its analysis, the Circuit Court noted that the KSP had no program for regularly testing or maintaining the physical fitness of its officers. Further, the KSP had permitted officers to remain on the job, in spite of known coronary problems. Citing the testimony of Drs. Pollock and Leon, the Sixth Circuit concluded that the district court had clearly erred in its findings under the standards of *Anderson* v. *City of Bessemer City, North Carolina,* 470 U.S. 564, 573 (1985).

The KSP challenged by petition for rehearing the Sixth Circuit's conclusions regarding the existence of

and availability of health and fitness testing for KSP officers. Petitioners also challenged the Circuit Court's application of the clearly erroneous rule.

REASONS FOR GRANTING THE WRIT

I. This Petition for Certiorari Should be Granted to Resolve the Split Among the Federal Circuit Courts on the Issue of Whether a Law Enforcement Employer Must Develop and Maintain Minimum Health and Fitness Standards to Satisfy the First Prong of the *Western Airlines* v. *Criswell*, BFOQ Test.

In its published opinion of November 1, 1988, the Sixth Circuit relied on *EEOC* v. *Pennsylvania*, 829 F. 2d 392, 395 (3rd Cir. 1987) to hold that the failure of the KSP to develop and maintain minimum health and fitness standards precluded the district court from finding that the KSP had established age as a bona fide occupational qualification under 29 U.S.C. § 623(f)(1). The Circuit Court further rejected the holding of the *EEOC* v. *City of East Providence*, 798 F. 2d 524 (1st Cir. 1986) that the absence of such standards, standing alone, did not compel a finding that physical fitness is not a reasonably necessary job qualification. This issue, the requirement for minimum health and fitness standards under the first prong of the *Criswell* BFOQ test, has markedly divided the federal courts.

As the matter now stands, the Third Circuit, in *EEOC* v. *Pennsylvania*, *supra*, and the Fifth Circuit in *EEOC* v. *Mississippi State Tax Commission*, 848 F. 2d 526 (5th Cir. 1988) (Jones, J., dissenting) and

EEOC v. *State of Mississippi*, 837 F. 2d 1398 (5th Cir. 1988) have adopted the requirement that a employer maintain minimum health and fitness standards as a prerequisite to satisfying the first prong of the BFOQ exception to the provisions of ADEA.

Under the first prong of the BFOQ test, as defined by this Court in *Western Airlines, Inc.* v. *Criswell, supra*, the job qualifications which an employer invokes to justify age discrimination must be reasonably necessary to the essence of his business. 472 U.S. at 414. Thus, the Third and Fifth Circuit hold that job qualifications such as aerobic capacity, cardiovascular fitness, strength, flexibility and endurance cannot be reasonably necessary to the essence of employment such as law enforcement unless the employer develops and maintains minimum health and fitness standards.

The First Circuit and the Eighth Circuit both strongly disagree with this new embellishment on the *Criswell* BFOQ test. In the First Circuit, the failure of a law enforcement employer to develop and maintain annual physical testing and training does not mean that these job qualifications are not reasonably necessary to the operation of a police department. *EEOC* v. *City of East Providence*, 798 F. 2d at 529. To quote the Circuit Court,

> The ADEA was intended to be used as a shield to protect older employees from discriminatory employment practices, not as a sword to compel employers concerned with public safety to perfect their procedures for assuring the maximum physical fitness of younger employees.

Id. Accordingly, the First Circuit concludes that physical abilities are not unnecessarily merely because a police department is slipshod in monitoring the health and fitness of its younger officers. *Id.* at 530.

The Eighth Circuit, in similar fashion, concludes in *EEOC* v. *Missouri State Highway Patrol,* 748 F. 2d 447, 454 (8th Cir. 1984) that regular physical examination and physical fitness programs are of questionable relevance to the issues arising under the *Criswell* BFOQ test. According to this Circuit, treadmill tests, combined with risk factor analysis, cannot determine which individuals actually will contract or have contracted coronary heart disease, and which individuals will suffer sudden cardiac attacks. *Id.* at 455. Also, the reliability of minimum standards testing is undermined by factors such as patient preparation, physician interpretation and the realities of the stressful situations that law enforcement employees encounter in performing their jobs. Accordingly, the Eighth Circuit concludes in *Missouri State Highway Patrol* that,

> the medical profession as is evidenced by the disagreements among qualified, respected experts, cannot practically or accurately distinguish between older individuals who can and older individuals who cannot perform safely and efficiently the hazardous and stressful duties that members of the patrol must perform." *Id.*

It is at present impossible to reconcile the conflicting interpretations of the BFOQ test now in force in the Third and Fifth Circuit with the position of the

First and Eighth Circuit. Resolution of this conflict among the Circuits is critically important, not only to the Petitioners, but to law enforcement employers throughout the nation. In 1993, the seven-year moratorium on ADEA litigation involving firefighters and law enforcement personnel will expire. 29 U.S.C. § 623(i) (Supp. 1988). At that time, those state and local law enforcement employers that continue to remain subject to statutory retirement provisions will be faced with a dilema of enormous consequence. If the Third and Fifth Circuit are correct, these employers will be required by the ADEA to institute broad-ranging, expensive physical fitness and health testing and maintenance programs. If the First and Eighth Circuit are correct, such "minimum health and fitness standards" programs will be unnecessary to justify mandatory retirement. The present conflict among the federal circuits offers little comfort to law enforcement employers, who will be left to gamble as to whether their Circuit will adopt the position of the First and Eight Circuit, or that of the Third and Fifth.

Petitioners respectfully sumbit that neither *Criswell* nor the legislative history of the ADEA mandate that "minimum health and fitness standards" be imposed upon state and local law enforcement employers as a prerequisite for age-related mandatory retirement provisions. This recently-created "minimum standards" addition to the first prong of the BFOQ test is unnatural judicial gloss that severs the first prong of the test from the second prong of the test,

under which the employer has the option to prove that age is a valid proxy by establishing that individual determinations are impossible. The "minimum standards" interpretation also destroys that portion of *Criswell, supra,* that affords employers substantially more discretion in developing job qualifications based upon safety-factor related duties. *Criswell,* 472 U.S. at 414; *Tuohy* v. *Ford Motor Company,* 675 F. 2d 842, 845 (6th Cir. 1982) ("the presence of an overriding safety factor may well lead a court to conclude as a matter of policy that the level of proof required to establish the reasonable necessity of a BFOQ is relatively low.")

The imposition of such standards on the states under the guise of *Criswell* and the ADEA is directly contrary to Congressional intent. Congress recognized as recently as 1977 that,

> "In certain types of particularly arduous law enforcement activity there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs and it may be impossible or impractical to determine through medical examinations periodic reviews of current job performance and other objective tests the employee' capacity or ability to perform the job safely and efficiently."

S. Rep. No. 95-493, pp. 10-11 (1977). Indeed, Attorney General Tom Clark explained to the Senate that as early as 1947, in considering mandatory retirement age for federal law enforcement officers, the Department of Justice sought to maintain the FBI as a 'young

man's service' and that "men in their 60's and 70's, forced to remain in the service, faced with the rigors of arduous service demanded of special agents and others, be not forced to carry on for lack of an adequate retirement plan. . . ." *Johnson v. Mayor and Baltimore City Council*, 472 U.S. 353, 365 (1985) (citing S. Rep. No. 76, 80th Cong., 1st Sess., pp. 1-2 (1947)).

Such mandatory minimum health and fitness standards as those required by the Third and Fifth Circuit are an unwarranted intrusion on the sovereignty of the states that was not contemplated by this Court when it held the ADEA applicable to the states in *EEOC* v. *Wyoming*, 460 U.S. 226 (1983) (Burger, Powell, Rehnquist and O'Connor, JJ., dissenting). If the "minimum health and fitness standards" requirement is, as the Fifth Circuit holds in *EEOC* v. *State of Mississippi*, 867 F. 2d at 1492, an absolute prerequisite to establishing age as a BFOQ, state and local law enforcement agencies throughout the nation will be severely impacted financially and institutionally. These agencies will be required to develop, institute and maintain detailed physical testing and maintenance programs, involving thousands of widely-dispersed employees. These employees will necessarily be forced to be diverted from their safety-related employment duties to participate in such minimum standards programs. Substantial sums of money will necessarily be diverted from already-strained budgets to implement

such programs. *EEOC* v. *Mississippi State Tax Commission*, 848 F. 2d at 535 (Jones dissenting).

Without clear guidance as to how these judicially-created fitness programs will be enforced or interpreted, state and local law enforcement agencies may well be faced with a new, second wave of ADEA litigation by disgruntled employees who claim that their discharge or adverse job action was the result of sham or overly-stringent fitness standards used as a pretext for age discrimination. The federal courts will find themselves slowly, but inevitably, mired in growing litigation involving the nature and application of such minimum health and fitness standards programs. To quote Judge Jones in her dissenting opinion in *EEOC* v. *Mississippi State Tax Commission*, *supra*, the courts will have "miss[ed] the forest for the trees." *Id.* at 534.

The Petitioners respectfully ask that this Court grant the present petition to avoid an unfounded interpretation of *Criswell* that is contrary to Congressional intent and is violative of state sovereignty.

II. This Petition for Certiorari Should be Granted to Enforce the "Clearly Erroneous" Doctrine of *Anderson* v. *City of Bessemer City, North Carolina*, and to Protect the Congressional Deference Afforded the Finder of Fact Under the ADEA.

The Finder of fact plays a uniquely critical role in ADEA litigation. In recognition of this role, Congress has expressed its intent that disputes involving age discrimination be resolved on a case-by-case basis by proof

to a jury. *Western Airlines, Inc.*, v. *Criswell*, 472 U.S. at 423 (citing *Loriallard* v. *Pons*, 434 U.S. 575 (1978)). The fact finder, be it a judge or jury, is to be vested with substantial deference in weighing the conflicting medical expert testimony that routinely accompanies ADEA litigation. *Id.* at 422-23. When public safety risks are added,

> The uncertainty implicit in the concept of managing safety risks always makes it reasonably necessary to err on the side of caution in a close case.

Criswell, 472 U.S. at 420.

The district court opinion expressly recognized that the present case is a "close case," and that safety-related risks were involved. [Appendix C.] As a result, the district court "carefully considered the testimony by both sides before concluding that defendant met is burden. . . ." [*Id.*] District Judge Bertelsman supported this conclusion with an in-depth summary of the testimony of Drs. Lind and Antlitz, both of whom testified that Kentucky's mandatory retirement age of 55 for KSP officers was reasonably necessary for the safe and efficient operation of the KSP, and that individual non-intrusive testing for cardiac occlusion was impractical. [Antlitz, T.E., Vol. II, p. 307; Lind, T.E., Vol. II, pp. 221-222.]

The opinion of the Sixth Circuit states no reason why the expert testimony of Drs. Lind and Antlitz is not highly plausible in light of the record view in its entirety. *Anderson* v. *City of Bessemer City, North*

Carolina, 470 U.S. 564, 573 (1985). The Sixth Circuit does not tell the district court what "total" and "crucial facts" it failed to take into "account." The district court had, in fact, already taken into account the absence of a mandatory fitness testing and training program, but had obviously chosen to "err on the side of caution" as the Court requires in safety-related risk factors. Indeed, on this point, the Sixth Circuit appears to have simply overlooked its own recent precedent, *Tuohy* v. *Ford Motor Company*, 675 F. 2d 842, 845 (6th Cir. 1982) that holds,

> the presence of an overriding safety factor might well lead a court to conclude as a matter of policy that the level of proof required to establish the reasonable necessity of a BFOQ is relatively low.

After reading the opinion of the Sixth Circuit, one is left with the strong impression that the Circuit Court chose merely to re-evaluate the credibility of the expert medical witnesses and judicially impose a minimum health and fitness standards requirement. Unfortunately, the Sixth Circuit does not explain which fitness or cardiovascular tests correlate to the actual job skills of a KSP officer, or how such tests can accurately predict asymptomatic coronary artery disease in any given individual, without subjecting that same individual to the risk of a coronary incident. Nor does the Circuit Court indicate how such tests can be meaningfully applied to specific individuals to justify adverse job action. The appellate court appears simply to have

found Doctors Pollock and Leon to be more believable than Doctors Lind and Antlitz. As this Court will discover on reading the opinion of the Sixth Circuit, its passing reference to the clearly erroneous rule and *City of Bessemer City* is that, and nothing more.

CONCLUSION

Accordingly, Petitioners respectfully request that this Court grant its petition for Writ of Certiorari in order to resolve the division among the federal Circuit Courts on the issue of minimum health and fitness standards and to correct an opinion of the Sixth Circuit that usurps the role of the district court as a fact finder and the protection of the clearly erroneous doctrine.

Respectfully submitted,

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